1991

State of Utah v. Linda Petersen : Brief of Appellant

Utah Supreme Court

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John T. Caine; Bernard L. Allen; Richards, Caine & Allen; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

STATE OF UTAH,	:	91-0337-CA
Plaintiff/Respondent.	:	
vs.	:	910055
LINDA PETERSEN,	:	Case No. ~~900222CA~~
Defendant/Appellant.	:	

BRIEF OF APPELLANT

APPEAL FROM A CONVICTION OF CRIMINAL HOMICIDE MURDER IN THE SECOND DEGREE, A FIRST DEGREE FELONY, RENDERED BY A JURY IMPANELED BEFORE THE HONORABLE RODNEY PAGE.

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IN THE UTAH COURT OF APPEALS

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Plaintiff,	:	BRIEF OF APPELLANT
vs.	:	
LINDA D. PETERSEN,	:	Case No. 900222CA
Defendant.	:	

JURISDICTION

Jurisdiction to hear the above entitled appeal is conferred upon the Utah Court of Appeals, pursuant to Utah Code Annotated, 1953 (as amended), 78-2A-3(2)(f).

NATURE OF PROCEEDINGS

This is an appeal from a conviction on the charge of Criminal Homicide Murder in the Second Degree, a First Degree Felony, rendered by a jury impaneled before the Honorable Rodney Page.

DATE OF DECISION

The Defendant was found guilty of Criminal Homicide Murder in the Second Degree, a First Degree Felony, by a jury on the 16th day of March, 1990. Defendant was sentenced on the 18th day of April, 1990, to serve a term in the Utah State Prison of not less than one (1), nor more than fifteen (15) years for the charge of Manslaughter, Judge Rodney Page exercising his discretion to reduce the charge from Criminal Homicide Murder in the Second Degree, a First Degree Felony, to Criminal Homicide Manslaughter, a Second Degree Felony.

The Defendant filed for post conviction relief, requesting that she be granted an appeal which was received by the Clerk of the Second Judicial District Court, County of Davis, State of Utah on the 18th day of April, 1990, along with the Motion for Certificate of Probable Cause.

This appeal, was directed to the Utah Court of Appeals by the Davis County Clerk, through the filing of a Certificate on Appeal on June 5, 1990.

STATEMENT OF FACTS

On September 1, 1989, Linda Peterson, the Defendant and her boyfriend her boyfriend, Michel Bertrand, had been living together for a number of months in her home located in Layton, Utah. Mr. Bertrand had been involved in an angry dispute with his ex-wife over his rights of visitation with his children that had expanded

over a two (2) to three (3) month period. Mr. Bertrand's ex-wife, Carolyn Zamora, refused him the right of visitation during that period of time. (Tp. 32, line 2)

The dispute eventually resulted in Mr. Bertrand's filing of a Petition for Change of Custody. (Tp. 32, line 18)

By September 1, 1989, Michel Bertrand had finally, through his attorney, made arrangements to visit with his children. He had an appointment to pick up the children at his ex-wife's residence at a certain time and his ex-wife was not there at the appointed time. (Tp. 535, line 5) This circumstance made Mr. Bertrand somewhat angry when he came home with his daughter, Tiffany. (Tp. 535, line 24)

The Defendant was working in the yard attempting to get the yard work completed prior to nightfall when Michel Bertrand came to her house at approximately 8:00 or 8:30. When the Defendant completed her labors she entered the home to find that Mich was feeding his daughter a cupcake and a piece of cheese for dinner. (Tp. 536, line 25) Defendant commented that he could certainly fix her something better to eat than that.

Defendant indicated that Michel became perturbed and left with his daughter to Albertson's, getting some chicken and a twelve (12) pack of beer. (Tp. 537, line 8) Defendant then took a bath and cleaned up for the evening. When the Defendant came out of the bathroom she learned that Mr. Bertrand had gone to sleep with his daughter and this hurt her feelings. (Tp. 539, line 2)

The Defendant indicated that she and Mr. Bertrand had discussed the difficulties they were having in their relationship and had talked about the possibility of him moving out of her house. (Tp. 538, line 3) The Defendant determined that she had worked hard and deserved a break away from the house without Mr. Bertrand, whereupon she left a note and called a cab to take her to an acquaintances house in Sunset, Utah. (Tp. 539, line 22)

Just prior to the arrival of the cab, Mr. Bertrand awoke and found the Defendant outside of the house waiting for the cab. He became angry that she intended to leave the house, became physically abusive to the Defendant and this physical struggle continued as the cab, driven by Jay Sevy, came in response to her call. (Tp. 44, line 22) Mr. Sevy testified that,

> "The woman was trying to get away and the guy was grabbing at her and slapping her." (Tp. 45, line 13)

The cabby indicated that the altercation was bad enough that had he not been picking up the Defendant as a fare and taking her away from the scene, he would have called a police officer and reported the assault. (Tp. 46, line 25) The cab driver helped the Defendant with her things into the cab and indicated that,

> "Her face looked like it was puffed up, looked like she had been crying." (Tp. 49, line 10)

and that,

> "Her demeanor was hysterical and crying." (Tp. 52, line 10)

The cab driver testified that,

> "She had asked her boyfriend to get out."

(Tp. 52, line 13)

It was approximately 11:30 p.m. on September 1st when Mr. Sevy took the Defendant from her residence in Layton and drove to the Toponce residence in Sunset. The Defendant arrived there at approximately 11:45 p.m. with her dog, some rum and coke, a couple of beers, some night clothes and a backgammon game. (Tp. 67, line 20). The Defendant met Richard Toponce at the residence and they fixed a drink and set about to playing backgammon.

Approximately thirty (30) minutes after arriving the Defendant made a phone call to her house and told Mich that she did not want him there when she got back. (Tp. 73, line 11) She told him to leave the keys on the counter. The Defendant and Mr. Toponce drank some into the evening, playing backgammon and eventually the encounter led to sexual relations between the two (2). (Tp. 77, line 10)

At approximately 3:00 a.m. to 3:30 a.m. on September 2nd, the Defendant got sick and requested Richard Toponce to call a cab, which he did. The cab that picked up the Defendant from the Toponce at approximately 4:00 a.m. was driven by Mr. Dean Steeley. He drove the Defendant back to her residence in Layton. He indicated that the Defendant did not talk much in the cab, but asked him in to the residence to get his check. (Tp. 103, line 10)

The cab driver entered the residence with the Defendant and went into the kitchen. At that time a man came out dressed only in bikini underwear and asked the cab driver if he was Linda's new

fuck, (Tp. 106, line 19) whereupon Defendant immediately told the man to leave her house. (Tp. 107, line 7) Defendant then went past him and down the hallway of her residence, whereupon the cab driver heard a crashing sound, like someone being pushed into the wall and pictures falling from the wall to the floor. (Tp. 108, line 19) He heard gasping and choking sounds coming from the hallway and heard a woman's voice cry,

> "Don't choke me!" (Tp. 109, line 5)

The cab driver next saw the Defendant go to the telephone, just outside the kitchen, in the hallway and call the police, requesting that they come immediately as she was being attacked and choked and wanted the man out of the house. (Tp. 110, line 21) The Defendant told the police dispatch on the telephone that she

> "did not want to die". (Tp. 151, line 1)

After the call Mr. Bertrand came back down with his pants on to the kitchen and asked Mr. Steeley to move his cab, which he did. (Tp. 111, line 23)

When Mr. Steeley came back to the door, he heard a crashing sound again and screaming. (Tp. 117, line 24) He opened the door and heard Mr. Bertrand yelling obscenities like

> "whore", "slut", (Tp. 120, line 8) and "get her off of me".

Mr. Steeley saw the victim holding the Defendant by her hair and shirt and hitting her head against the wall near the bottom of the stairs. (Tp. 118, line 16) He indicated that the Defendant broke

away and turned to go upstairs whereupon Mr. Bertrand caught her again near the top of the lower flight of stairs and hit the Defendant into the door a number of times. (Tp. 121, line 19)

Mr. Steeley told Mr. Bertrand to let the Defendant go and said that

> "she is trying like a son-of-a-gun to get away". (Tp. 157, line 8)

Mr. Steeley saw the Defendant go upstairs and Mich go downstairs. The Defendant then returned to the stairway carrying a small kitchen knife, leaning over the upper landing of the stairway, hollering for Mr. Bertrand to get out. (Tp. 164, line 14)

The Defendant then proceeded down the stairs to approximately the third step from the bottom and at that time the victim came around the corner in an upright position,

> "like a flash". (Tp. 166, line 6)

The witness did not see clearly as it was somewhat dark down the stairway, but he testified that the Defendant did not make any kind of stabbing motion, overhand or otherwise, and that the knife was held in front of her. (Tp. 167, line 11)

After the Defendant and Mr. Bertrand came together, Mr. Steeley heard Mr. Bertrand say "Oh God, she stabbed me" and the Defendant saying "now leave", with Mr. Bertrand saying "I cannot drive", (Tp. 127, line 7) whereupon the victim collapsed at the bottom of the stairs.

Mr. Steeley went down the stairs, noticed the knife at the feet of the victim, grabbed the knife and carried it to the sink

in the kitchen. He went back to the basement and noticed blood on the victim's hand and got a cloth and put it in the victim's hand. When the police officers arrived, Mr. Steeley told them,

> "it was in self defense". (Tp. 131, line 25)

He later told an officer,

> "I feel she was acting in self defense. He was brutally beating on her." (Tp. 194, line 6)

When the police officers arrived they found the victim dead or dying at the bottom of the stairs and the Defendant in the garage. They found blood on the wall of the lower stairwell, just above the riser of step number two (2) and approximately twenty inches (20") high. (Tp. 229, referring to Exhibit "19") They also found an indention in the wall behind the door with fresh plaster dust on the doorknob. (Tp. 227, referring to Exhibit "17" and Exhibit "18") The Defendant was placed under arrest, put in a patrol car and taken to the Layton Police Department.

Defendant indicated to any of the officers that asked, that she had acted in self defense. She told Officer Brown that her action was not intentional. (Tp. 311, line 13) She was in enough distress to warrant a check by physicians. The officers suspected the Defendant was hyperventillating, (Tp. 308, line 16) but in his concern for physical condition he called the paramedics and she was taken to the hospital.

Officer Beckett testified that she heard the Defendant tell a nurse,

> "I was beat up, I was beat against the wall, like slammed, you know", (Tp. 330, line 2)

and that her head hurt. At one point the Defendant said

> "Lord, let me die, I took somebody's life, take me now."

Her effect changed drastically from loud yelling to crying to a totally subdued mood.

The doctor treated the Defendant for emotional trauma, gave her shot of valium and checked her physically, finding no immediate indication of physical trauma to the Defendant, but testified that did not mean that she hadn't been thrown up against the wall or traumatized physically. (Tp. 325, line 15)

Officer Madsen, the booking officer, indicated that the Defendant was

> "very upset emotionally, she was crying. Physically her face was quite flushed, her eyes were red. She was very emotionally upset and distraught." (Tp. 334, line 7)

Defendant was very cooperative during the booking procedure, but because of her emotional state at times the booking process had to be discontinued for her to calm down. The Defendant told Officer Madsen that

> "I killed him. I killed my boyfriend. I will never see him again." (Tp. 335, line 14)

and that she cried most of the time, telling the officer that

> "It was not my responsibility."

The Defendant asked the officer what it felt like when the officer found himself in a position where he had to shoot someone. (Tp. 339, line 11) Defendant indicated that her head hurt and she wanted to go home and go to sleep. (Tp. 341, line 4)

Dr. Todd Gray from the State Medical Examiner's Office testified that the victim died of a small knife wound to the middle of the chest, penetrating the sternum, piercing the heart and the esophagus. He indicated that it could have been virtually instantaneous. Dr. Gray testified that such a wound would have resulted in a small spurt of blood with the removal of the knife and the tissues would likely swell and tend to close the opening, limiting external bleeding. (Tp. 363, line 23)

He indicated that there were no hilt marks on the victim which meant that the knife was not forced through the victim hard enough to result in bruising caused by the handle of the knife. (Tp. 365, line 12) Dr. Gray testified that he had examined the Defendant's clothing, but the majority of the blood stains was on her sweat pants approximately four inches (4") below the top of the pants and down mostly on the left side of the front of the pants. (Tp. 381, line 22) There was little or no blood from the waist band to the top of the sweatshirt.

Dr. Gray admitted that the Defendant's version of the facts was a reasonable explanation of the delivery of the wound to the victim. (Tp. 395, line 9) That the blood splatter on the wall, stairs and clothing of the Defendant appeared to be in all the right places to verify the Defendant's explanation of the events. (Tp. 41, line 13) The Dr. indicated that his only concern was that under Defendant's explanation the victim would likely have continued on forward into the Defendant, causing some actual contact and likely resulting in smeared blood on the Defendant and

the victim. However, he admitted that the relative positioning of the two (2) people involved with the knife being held by the Defendant at approximately her strongest point, i.e., center of gravity, and with the vertical element to the motion of the Defendant, the possibility that the victim may have had some reaction to stop his forward momentum may all have had an effect in keeping the victim from falling over onto the Defendant.

The State's blood expert, Jim Bell, testified that he had concerns over the Defendant's version of the facts not resulting in the victim falling into the Defendant. However, Mr. Bell had to admit that the State's version of the facts required some fairly fancy footwork on the part of the Defendant to avoid the victim bleeding on her at a level higher than four inches (4") below the top of her sweat pants, postulating that perhaps the Defendant had stabbed the victim while he was higher than her on the stairway and then immediately rushed away from the victim so that minimum of blood would have sprayed on her.

The Defendant's investigator, Keith Taylor, an Ogden City Police Officer, testified as to photographs that he took of injuries to the Defendant, including a bruise on her right knee, bruise on her higher left leg, bruise on her right buttock, bruise on her left upper arm, bruise on her left leg front, bruise on her chest and bruises to her head. (Tp. 486, various lines) Dr. Berwell, the Defendant's personal physician, testified that he found the same bruises and gave a description of the size and location of each of these bruises. (Tp. 517)

The Defendant testified that she did not get the knife with the intention of using it against the victim, but that she got it to make certain that the victim did not attack her again. (Tp. 557, line 14)

SUMMARY OF THE ARGUMENT

1. The District Court, at the end of the State's case in chief, erred in not granting Defendant's Motion for Judgment of Acquittal, based upon the State's failure at that point in the Trial to prove that the Defendant did not act in her own self defense.

2. The jurys' verdict of guilt to Criminal Homicide Murder in the Second Degree (First Degree Homicide) was against the clear weight of the evidence on the issue of self defense and reasonable minds could not have found guilt beyond a reasonable doubt.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL

At the close of the presentation of the State's evidence, the Defendant, through her attorney, John T. Caine, moved the Court for a Judgment of Acquittal. In this Motion it was suggested to the Court that the State had presented the charge as a Second Degree Murder and therefore, had to prove one of three (3) factual

circumstances outlined by the statute to secure a conviction. It was clear that the State did not allege or even intend to show that this was an intentional killing. (Tp. 465, line 6)

The State's case hinged on the other two (2) alternatives. One being that the Defendant recklessly, intending to cause serious bodily harm or other injury, committed an act of homicide, or that she acted in a way evidencing a depraved indifference to human life and thereby caused the death of another.

The Court of Appeals has ruled recently in the case of State v. Harman, 767 P.2d, 567 (Utah Appellate 1989) that in reviewing the results of a jury trial,

> "we reverse ..... only when the evidence ..... is sufficiently inconclusive or inherently improbable, that reasonable minds must have entertained a reasonable doubt that the Defendant committed the crime ...."

The Court went on to state that,

> "although this a high standard, it is not insurmountable. We will not make "speculative leaps across ..... remaining gaps" in the evidence .... every element of the crime must be proven beyond a reasonable doubt. If the evidence does not support those elements the verdict must fail." (Id at 568)

Defendant argues that as the Motion for Acquittal was before the Judge and resulted in a judicial decision, that this Court should use the standard of review discussed in the Utah State Supreme Court decision of State v. Goodman, 763, P.2d 786 (Utah 1988), where the standard was that the decision of the Trial Court must be sustained unless it is

> "against the clear weight of the evidence or if the Appellate Court otherwise reaches a

> definite and firm conviction that a mistake has been made."

and later states that

> "in reviewing a bench trial for sufficiency of the evidence, we require that the weight of the evidence, discounting questions of credibility and demeanor not oppose the verdict." (Id at 786-87)

Defendant recognizes that the verdict was rendered by a jury in the present case. However, because of the Motion to Dismiss, this Court has the opportunity to review the decision making process of the Judge in this case and alleges that the evidence presented by the close of the State's case simply did not rise to the level required for a conviction of Second Degree Murder.

There were three (3) eyewitnesses to the actions which resulted in Mr. Bertrand's death. That being the victim, who of course was not able to testify in this Trial, although his actions prior to the time of death spoke clearly as to his emotional state and intentions prior to the actions which resulted in his death; the Defendant, who at the time of the defense Motion for Acquittal had not had the opportunity to testify; and finally, the cab driver, Mr. Steeley, who made it absolutely clear to everyone who listened, that he had witnessed the entire event and testified to a set of facts that clearly pointed to an act of self defense on the part of the Defendant.

The State's experts also testified that the evidence they analyzed was consistent with the observations made of the events by the eyewitness and subsequently by the Defendant and could only

point to a single factor that they found troubling in reviewing the events outlined by the defense's position. This factor was doggedly held to by the State throughout the course of the investigation and the Trial.

The State's experts were called to say that if the victim had come around the corner of the basement and up the stairs, essentially running into the Defendant, that the force or momentum of his moving body would have forced the body, after being stabbed, to come into contact with the Defendant, smearing the blood on her sweatpants that she was wearing.

However, the State's Medical Examiner, Dr. Todd Gray, admitted during cross-examination that there were a number of potential factors involved in what effect the relative forces the knife and the two (2) individuals acting out the event would have had on the end result.

Dr. Gray admitted that the positioning of the knife as testified by cab driver, Dean Steeley, as being held by the Defendant in both hands in front of her at approximately belly button level or below, placed the knife in the most stable position for her torso, basically at her center of gravity. (Tp. 401, line 19) Dr. Gray also admitted that the resulting force on the victim of the knife, pushing it at approximately the level of his sternum, was a position of far less stability on the victim, agreeing with the proposition that it is easier to push a person away when the force is applied at the top of the person, than it is to push a person away from forces applied at the middle. (Tp.

401, line 25)

Dr. Gray also reviewed the possibility that the Defendant's reflex action to push the victim away from her may have had some effect on the force applied at the end of the knife. (Tp. 402, line 12) The Doctor further agreed that the force or momentum of the victim was somewhat dissipated in his rising up the steps, stating that

> "there is a vertical component to the motion." (Tp. 403, line 4)

Dr. Gray also testified as to the mistaken assumption being made by the State in espousing what the State considered to be this problem of no smeared blood on the Defendant and that is that

> "it assumes the body tripped or has fallen, went in a forward motion." (Tp. 405, line 11)

The evidence presented by the eyewitness was that the victim did not immediately lose muscular control upon being stabbed. In fact his testimony was that the victim stood in place for a moment of time and made a number of comments before falling backwards down the last two (2) stairs, where he was found by the police in the appropriate position for having been stabbed and dying on the second step of the lower stairwell as described by the eyewitnesses.

The State wanted very badly to leave the impression with the jury that the Defendant was somehow below the victim at the time the stabbing took place and that the victim was stabbed by the Defendant, using a strong overhand stabbing motion as is seen in

the movies, such as "Psycho".

The myriad of inconsistencies in this scenario so far outweigh the alleged concern with the defense version as to make it utterly unbelievable. First of all the scenario is in direct conflict with the eyewitness testimony, also, the blood pattern found on the clothing worn by the Defendant, as well as the blood found on the wall and steps at the second step and below could not have occurred under the State's scenario. Mr. Bell attempted to make it sound possible regarding the blood found on the Defendant's clothing by stating that she could have somehow run up to the victim and stabbed him with an overhand motion with the victim above her on the stairway and then somehow, with her short 5'0" frame, pull the knife out of the wound and through an act of gymnastics, jump almost clear of the resulting arterial spurting blood that would then miraculously not fall on her hand, arm, chest or abdomen, but only land on her sweatpants, approximately four inches (4") below the top and down her leg.

Although the State's witness could not give an particular indication as to why the Defendant would want to go to this trouble, it is rather unlikely that her actions were taken in the heat of such a moment, leaving her with the mental acuity to jump away from the victim at just the right angle to make the blood spots on herself coincide exactly with what would become the defense's scenario of the events. This is not to mention the difficulty the State would have in trying to show how if the victim was stabbed near the top of the lower landing of the

stairs, with the Defendant below him, how he managed to bleed only on the bottom two (2) stairs of that stairwell while walking mortally wounded all the way down the lower half of the stairs, reaching the bottom in time to turn around and fall on his back.

Curiously the State did not really attempt to describe that scenario in any detail to the Court or to the jury, recognizing that it simply did not hold up under the physical evidence that was found at the scene, not to mention the eyewitness testimony.

The most incredible fact of all in support the defense's version of this event was demonstrated to Dr. Gray during his cross-examination, using the model of the stairs presented into evidence by the defense with the Defendant standing at approximately the third step of the model and defense attorney, Allen, who as indicated was the same height as the victim in this case, walked around the corner and up the stairs and into the Defendant. That action as described by the eyewitness and demonstrated to Dr. Gray, the in-court demonstration by the defense, placed the knife in exactly the position on the victim as where the fatal wound actually occurred. (Tp. 387, line 19)

Clearly the sheer weight of the physical evidence opposed the scenario proposed by the State and places the Defendant in a position where the actual stabbing was either an act of clear self defense, fending of the advance of the victim or very probably, an accidental act intended neither by the victim, nor the Defendant. The defense's position at Trial was that procuring the knife by the Defendant was an act of self defense and that the

actual stabbing was a result of an accidental collision of the Defendant and the victim.

The State not only failed beyond a reasonable doubt to rebut this scenario, but in fact the defense proved beyond a reasonable doubt that this was the actual set of events that resulted in the death of Michel Bertrand.

The case of State v. Smith, 675 P.2d, 521 @ Pg. 524 (Utah 1983) as referred to in the Utah Court of Appeals decision in State of Utah v. Strieby, 790 P.2d 98, (Utah Appeals 1990) held that

> "the State is required to show some evidence of every element of its cause of action, or a lesser included offense, to avoid an unfavorable directed verdict at the close of its case in chief."

The Court went on to say that

> "however the State is not required to prove a dearth of self defense as one of those elements."

Quoting Utah Supreme Court case of State v. Knoll, 712 P.2d, 211 @ Pg. 214 (Utah 1985) where the Supreme Court ruled that

> "absence of self defense is not one of the prima facia elements of homicide."

In the Strieby case the Court found that the State did meet its burden set forth in prima facia case. However, that case differed drastically from the present case, in that the Court in Strieby had not been given the Defendant's version of the facts prior to the defense raising the element of self defense in its own portion of the case.

In the present case however, the State's own witnesses, through the eyewitness testimony of the two (2) cab drivers and the testimony of Dr. Gray commenting on the in-court demonstration presented by the defense, clearly set forth the elements of self defense in the course of the State's case in chief. Therefore, it was not simply a matter for the State to present its elements and wait for the defense to bring up the issue of self defense, but in fact the issue of self defense was inherent in the case in chief presented by the State.

The factual presentation of evidence by the State in the present case does allow the defense to raise the case of State v. Knoll, 712 P.2d, 211 (Utah 1985) on self defense in its argument that the Judge erred in not directing an acquittal after the State's case in chief. The Knoll case as described in Appellant's Brief in the Strieby case is controlling regarding the State's proof requirements in a case of self defense and makes it clear that once the issue is raised, it is the prosecutions burden to prove beyond a reasonable doubt that the actions were not made in self defense.

> "A Defendant is not required to establish a defense of self defense beyond a reasonable doubt or even by a preponderance of the evidence..... In some, where there is a basis in the evidence where the evidence is produced by the prosecution of by the Defendant which would provide some reasonable basis for the jury to conclude that a killing was done to protect the Defendant from an eminent threat of death by another an instruction on self defense should be given the jury; and if the issue is raised, whether by the Defendant's or prosecution's evidence, the prosecution has the burden of proof, beyond a reasonable

> doubt, that the killing was not in self defense." (Id at 214) (Emphasis added as quoted in Appellant's Brief in the case of State v. Strieby)

In the present case the State could not allege that the victim was incapable of inflicting violence against the Defendant or that such an action was even against his nature. Mr. Bertrand's ex-wife, Carolyn Zamora, testified that on prior occasions Mr. Bertrand had become extremely angry with her and had acted out that anger by hitting her. (Tp. 40, line 6) More recently, Mr. Bertrand had become so angry with his ex-wife that he had kicked in the rear fender of her vehicle. (Tp. 36, line 1)

Ms. Zamora further stated that Mr. Bertrand could be extremely angry and abusive over issues that involved his children and that she had been forced to allow visitation after refusing it to the victim for over two (2) months. She testified that her attorney had told her that on the 1st day of September she would have to allow visitation. Ms. Zamora testified that she was supposed to be home with the children for Mr. Bertrand to pick up at 7:00, but by the time she actually arrived home at 7:25, she found that Mr. Bertrand had been there and left and that when he returned to pick up the children, only his daughter, Tiffany, wanted to go with him. (Tp. 28, line 3-11)

This course of events and the fact that the victim had been drinking (toxicology report indicated he had a blood alcohol level of .09 at the time of death) provide plenty of reasons for the

victim to be in a less than agreeable mood.

The State in the present case was faced with a factual situation that made it clear or at least as clear as can be expected in such a case, as to the events leading up to the death of the victim and the manner in which he died. This scenario of the death of Michel Bertrand provided little or no evidence upon which the State could carry its burden of proof to show the Defendant was guilty of Second Degree Murder, nor did the State carry its required burden of proof on the issue of self defense.

The Trial Court's refusal to enter an acquittal on the charge of Second Degree Murder at the end of the State's case in chief was against the clear weight of the evidence and should be reversed.

POINT II

THE JURYS' VERDICT OF GUILT WAS RENDERED WHERE THE EVIDENCE WAS SUFFICIENTLY INCLUSIVE THAT REASONABLE PERSONS MUST HAVE MAINTAINED A REASONABLE DOUBT

The ground rules for reviewing a jury verdict in the Appellate Court is well established. The Rule is clear that the evidence in a case under review must be examined in a light most favorable to the jurys' verdict. (See State v. Harman, Id at 568)

As discussed previously in this Brief, this Court however, has made it clear in the Harman case that

> "although this is a high standard, it is not insurmountable. We will not make speculative leaps across remaining gaps in the evidence. Every element of the crime charged must be proven beyond a reasonable doubt. If the

> evidence does not support those elements the verdict must fail." (Id at 568)

This passage from the Harman case is quoted again under this argument of Defendant's appeal because of its importance to the defense's second argument.

The Defendant maintained at Trial and continues to allege in this appeal that her procurement of the knife on the early morning hours of September 2, 1989 was an action taken in her own self defense and further was an action completely justified by the events of that morning and the previous evening.

It is important at this juncture to capsulize the abuse that the Defendant had been forced to endure during the period of time prior to the tragic death of Michel Bertrand. The evidence of the prior abuse is clearly corroborated by a number of different and independent witnesses and virtually unrebutted by the State.

The Defendant testified that when she had determined that she had put in enough work at home and wanted to go out on her own in the evening, that she quietly called a cab and sat out in front of the house waiting for the cab to arrive. She testified that when Mr. Bertrand awoke and found that she was intending to leave he became upset, angry and physically abusive.

The Defendant testified that Mr. Bertrand slapped her, grabbed her and shook her around and that she was very scared by his behavior. (Tp. 542, line 20) The fact that he had not really been physically abusive to her previously made this conduct all the more shocking to her. The Defendant also testified that this

physical abuse continued until the cab driver got out of his car in front of her house. Mr. Jay Sevy, the cab driver who arrived that night, clearly corroborated this testimony. The cab driver testified that in his opinion the abuse was bad enough that had he not been personally taking the Defendant from the scene, he would have referred the matter to the police.

Mr. Sevy further testified he heard the Defendant say that she had told her boyfriend to get out of her house. This was the first of many corroborated statements made by the Defendant requesting that Mr. Bertrand leave her house permanently.

Shortly after the Defendant arrived at the Toponce residence she was heard, as testified to by Richard Toponce, on the telephone specifically telling Mr. Bertrand that he was to pack his things and get out of her house and leave his keys on the counter, indicating that she was extremely upset by the physical altercation at her house and that she no longer wanted to maintain a relationship with Mr. Bertrand, at least not with him living in her residence.

The State attempted to place the events at the Toponce residence in the most negative light possible. However, the actions of the Defendant there are extremely revealing. First of all, the Defendant does not return to her house for a matter of three (3) to four (4) hours after the telephone call to Mr. Bertrand, leaving the victim plenty of time to leave her residence without having to come into actual physical contact with him. During the course of the Defendant's stay with Richard Toponce she

attempts to calm herself by drinking alcoholic beverages and playing backgammon. At a later time, as the Defendant testified, they had sexual relations, which could be interpreted as an attempt to seek comfort after the breakup of her relationship with Mr. Bertrand.

The Defendant then decides to return to her residence and feeling concerned about whether or not Bertrand has left her residence, asks the cab driver to assist her with her things and has him walk to the kitchen with her. At that time the second episode of physical and emotional abuse occurs. Mr. Bertrand shows his State of mind clearly with his opening comment regarding the cab driver who is sitting at kitchen counter. When the Defendant attempts to walk away from Mr. Bertrand, he follows her down the hall and according to the Defendant, slams her up against the wall, knocking the pictures from the wall to the floor and puts his arm around her neck choking her. This is verified by the testimony of the eyewitness who says that he hears the slam, the pictures falling, heard the Defendant gasping and gurgling and heard comments from her requesting that Mr. Bertrand stop choking her.

The physical evidence is also corroborated of this event as the pictures are in fact found by the police, having fallen from their places on the wall and the victim is found to have a strong bite mark in a location that, according to Dr. Gray, was consistent with his arm around the neck of the Defendant. The Defendant at this time does not immediately rush for some type of

weapon in an attempt to injure the victim, which might have been the case if her motive was violence or revenge as the State seemed to imply, but in fact the Defendant goes straight to the telephone and dials the police, requesting their immediate assistance in getting Mr. Bertrand out of her house. This is now the third corroborative demand by the Defendant for Mr. Bertrand to leave her residence.

The Defendant also informs dispatch that she has been assaulted and choked and that she was afraid for her life. This call was corroborated both by Mr. Seeley, the eyewitness, and also by the tape recording made at the Layton City Dispatch. At this point Mr. Bertrand appears to be acquiescing in the Defendant's demands to leave the residence and sends the cab driver out of the house ostensibly to move his car.

By the time the eyewitness returns to the house he finds that Mr. Bertrand not only has not gotten in the truck to leave, but in fact has again grabbed onto the Defendant by the hair and shirt and is smacking her into the side wall at the bottom landing of the stairway. He indicates that the Defendant breaks away from the grasp and runs to the top of the stairs where she is again grabbed by Mr. Bertrand and slammed into the front door.

The jury did not have to take the Defendant's word for this occurrence or even the corroboration of the eyewitness testimony, but was shown verification of this particular act of violence by photographs of the door handle showing a clear indention into the wall behind the door with plaster dust all over the door handle.

When the Defendant finally breaks the victim's grasp at the urging of the witness, Steeley, she has now been physically assaulted by Mr. Bertrand on four (4) distinct, separate occasions. Four (4) acts of specific violence perpetrated upon the Defendant by Michel Bertrand.

Also during this time the Defendant has attempted on at least three (3) occasions to get Mr. Bertrand to leave her residence and leave her alone, including a desperate call to the Layton City Police Department. The Defendant is eminently justified at this point in time in gaining for herself some protection against further physical violence and to this end, she goes to the kitchen and gets a paring knife from the butcher block. The Defendant then returns to the stairwell and leans over the upper stair rail and again yells "get out".

Not seeing Mr. Bertrand and not knowing what he is up to, the Defendant walks down the stairs, stopping at the third or second step from the bottom. To this point in time, the jury has not had to depend upon the mere testimony of the Defendant to believe the facts related. Every event is specifically corroborated by eyewitness testimony and physical evidence. There is not a single piece of evidence as here related that did not carry the weight of physical or eyewitness verification.

At this point the Defendant testified that she did not know for sure where Mr. Bertrand was, but that she was holding the knife directly in front of her in a defensive posture, in a way she felt Mr. Bertrand would clearly see that she was not going to

allow him to cause her any further physical injury. She is also calling out "get out" so that Mr. Bertrand has no excuse for not knowing her desire.

The Defendant states that at this time Mr. Bertrand comes around the corner and up the stairway at her. She testified that he came at her at a rapid rate. Mr. Steeley testified that the victim looked like a "flash" coming around the corner from the family room of the house. He bounded up one (1) or two (2) steps to the point where, as the physical evidence and demonstration of the defense showed, the knife came directly into contact with the victim at his chest. Mr. Bertrand was stabbed one (1) time through the sternum, piercing the heart. A single mortal wound.

The State's only attempt to contradict any of this evidence as stated previously was there contention that if the victim had come at the Defendant fast enough to become impaled upon the knife, that he would have had to have collided with the Defendant.

The State's theory is analogous to the difficulty we might have in believing that we could be killed in an automobile accident, striking something when we were only going 20 mph. The laws of physics show however, that that accident can indeed be fatal if the object we strike has momentum of its own compounding the rate of force.

It is extremely likely that as the victim came around the corner, surprising the Defendant, that she may have reacted by reflex as discussed with Dr. Gray by pushing the victim away. Unfortunately this push was made by a hand that contained a sharp

paring knife. The combination of the force caused a fatal wound to be inflicted upon Mr. Bertrand.

Again, the jury did not have to take the Defendant's own testimony as the only evidence of this event. The evidence was clearly corroborated by the eyewitness testimony of the cab driver, Dean Steeley, and to a substantial degree was corroborated by the physical evidence. The blood stains on the Defendant's clothes were only found below her waist, except for one (1) odd drop of blood that wound up on her shoulder. This odd drop of blood was never tested to verify whose blood it was and the testimony clearly indicated that the Defendant had a cut behind her ear that bled and could have well been the cause for that one (1) drop of blood.

The Defendant did not have blood on her sleeves or arms to any extent, clearly indicating that her arms and sleeves were at a level equal or higher than the wound suffered by Mr. Bertrand. The blood on the stairs and stair walls clearly indicate that the victim could not have been higher than on the first or second step from the bottom of the stairs at the time the wound was inflicted. The body was found lying on its back at the bottom of the stairs, which is the most natural resting place imaginable based upon the defense's scenario of the events. Finally, the wound lines up perfectly with the knife held by the Defendant in the way she testified as demonstrated to Dr. Gray. All of these events are clearly corroborated by the physical evidence and could not have been coincidental or invented by the Defendant.

This explanation of the events of the night of September 1st and the morning of September 2nd clearly do not give the State any evidence, much less evidence that reaches the level of proving a case beyond a reasonable doubt that the Defendant committed any of the possible elements of Second Degree Murder or of Manslaughter.

The Judge in this case gave a confusing Jury Instruction regarding circumstantial evidence and what the jury was to do under circumstances where two (2) possible scenarios were equally as likely. The Rule of the law has been that the Defendant is entitled to the jurys' belief in the Defendant's scenario of the events under that type of circumstantial case.

The present case is extremely analogous to the case of State v. Strieby, although there are some specific differences. One difference is the fact that the present case was tried before a jury, whereas the Strieby case was tried before a Judge. The Court took cognizance of the fact that the Appellate Court could use a little different standard in a Judge Trial than was required in a Trial before a jury and Defendant is cognizant of that difference.

However, the present case has some substantial factual advantages over the Strieby case in that all of the important testimony of the Defendant is verified by competent and independent eyewitness testimony. In this case the Court would not only have to "make speculative leaps" across gaps in the evidence. (State v. Harman) But, in addition, the Court has to

at the same time climb over and ignore a great wall of evidence provided by eyewitness testimony and the physical evidence left at the scene to come to the conclusion that the State had proven the elements of the crime charged against the Defendant beyond a reasonable doubt.

The State also failed to meet its burden identified in the case of State v. Knoll, 712 P.2d, 214 and again referred to by the Court in Strieby. The State has to prove the absence of self defense after it is properly raised. In fact the Defendant in this case carries the burden to "establish a defense of self defense beyond a reasonable doubt or even by a preponderance of the evidence".

The only attempt made by the State to disprove the defense's allegations of self defense was testimony from the police officers that the Defendant did not appear physically damaged enough. The State's expert in this area, Dr. Condie, however, made it clear that the fact that there weren't immediately discernable cuts and bruises on the Defendant did not mean that she had not been traumatized. People vary in their reaction to physical trauma. Some people bruise easily, other people don't. The Defendant presented corroborating evidence from Keith Taylor, as well as Dr. Berwald to indicate that the Defendant did have a number of bruises and marks on her body following the events of September 2nd.

However, it is not the State's position to determine how much of a beating a person has to put up with before that person can

take action to defend herself. Unlike the Strieby case, the Defendant did not go up and grab a gun, which was clearly an offensive weapon that could be used to inflict mortal injury from a great distance away. The Defendant procured a small to middle sized knife from her kitchen and held it close to her body in a strictly defensive measure to keep Michel Bertrand from assaulting her physically again.

The evidence in Strieby clearly showed that the Defendant fired the weapon at the victim, knowing that her actions would result in death or serious bodily injury to the victim.

In the present case the State could not even clear that burden, as the evidence tended to show and verify the Defendant's contention that the actual stabbing was accidental or at the most, reflexive.

Instead of presenting strong evidence in support of a case, the State attempted to portray an attitude or image of badness in the Defendant by having the police officers indicate that the Defendant showed no remorse after the death. This tactic must have been successful in light of the jurys' verdict. However, it is not appropriate evidence to support the actual event. People react to stress and shock in different ways and even the police officers, who on the stand, attempted to say that the Defendant showed no remorse or emotion regarding the events that had just occurred, had to admit on cross-examination that the reports indicated quite to the contrary, very often showing that the Defendant was grossly remorseful and extremely shaken and upset

by the events.

In addition, the Defendant's extemporaneous statements to these officers always included a reference to her action being unintentional and in self defense, putting into words the clear presumption of innocence that the Defendant was entitled to and which presumption the State never overcame.

This Court's closing comment in the Strieby decision regarding the Judge's guilty verdict is equally applicable to this case in that the jurys' verdict is "contrary to the clear weight of the evidence and as a result, that the State failed to prove the elements of Manslaughter (or Murder in the Second Decree) beyond a reasonable doubt."

CONCLUSION

The District Court, at the end of the State's case in chief, erred in not granting Defendant's Motion for Judgment of Acquittal, based upon the State's failure at that point in the Trial to prove that the Defendant did not act in her own self defense and the jurys' verdict of guilt to Criminal Homicide Murder in the Second Degree (First Degree Felony) was against the clear weight of the evidence on the issue of self defense and reasonable minds could not have found guilt beyond a reasonable doubt.

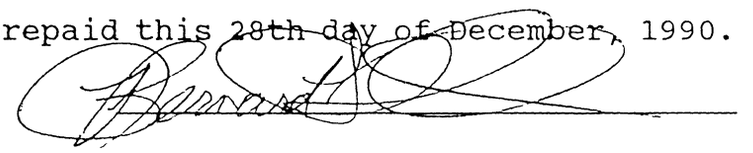
RESPECTFULLY SUBMITTED this 28th day of December, 1990.

JOHN T. CAINE
Attorney for Defendant

BERNARD L. ALLEN
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that I mailed four (4) true and correct copies of the above and foregoing Brief of Appellant to the Plaintiff, Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, postage prepaid this 28th day of December, 1990.



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IN THE DISTRICT COURT

DAVIS COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. LINDA D. PETERSEN, Defendant.	: : : : : : :	NOTICE OF APPEAL Civil No. 891706536 Judge Rodney Page

COMES NOW the above named Defendant, by and through her attorneys, John T. Caine and Bernard L. Allen and hereby gives notice of her intent to appeal that jury conviction of Second Degree Homicide, a First Degree Felony, entered on April 18, 1990 by this Court, the Honorable Rodney Page presiding to the Utah Court of Appeals.

DATED this 18th day of April, 1990.

JOHN T. CAINE
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the above and foregoing Notice of Appeal to the Plaintiff, Davis County Attorney's Office, Davis County Courthouse, Farmington, Utah 84025, postage prepaid this 18th day of April, 1990.

SECRETARY

2568 WASHINGTON BOULEVARD
OGDEN, UTAH 84401
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(d) carry out duties prescribed by the Supreme Court and the Judicial Council.

(5) Filing fees for the Court of Appeals are the same as for the Supreme Court. 1988

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary

(a) to carry into effect its judgments, orders, and decrees; or

(b) in aid of its jurisdiction

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of.

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) appeals from the circuit courts, except those from the small claims department of a circuit court;

(e) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(f) appeals from district court in criminal cases, except those involving a conviction of a first degree or capital felony;

(g) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Chapter 46b, Title 63, in its review of agency adjudicative proceedings. 1990

78-2a-4. Review of actions by Supreme Court.

Review of the judgments, orders, and decrees of the Court of Appeals shall be by petition for writ of certiorari to the Supreme Court. 1986

78-2a-5. Location of Court of Appeals.

The Court of Appeals has its principal location in Salt Lake City. The Court of Appeals may perform any of its functions in any location within the state. 1986

CHAPTER 3
DISTRICT COURTS

Section

78-3-1 to 78-3-2. Repealed. 1971, 1981, 1988

78-3-3. Term of judges — Vacancy.

Judges of the district courts shall be appointed initially until the first general election held more than three years after the effective date of the appointment. Thereafter, the term of office for judges of the district courts is six years, and commences on the first Monday in January, next following the date of election A judge whose term expires may serve, upon request of the Judicial Council, until a successor is appointed and qualified. 1988

78-3-4. Jurisdiction — Transfer of cases to circuit court — Appeals.

(1) The district court has original jurisdiction in all